A journey towards ESG: Key competition law issues examined

ESG (Environmental, Social, and Governance) considerations are growing in importance for companies and businesses globally, so much so that we have now arrived at the point where ESG has become one of the key priorities in boardrooms everywhere. Regulations are emerging, the pressure from stakeholders is increasing, and consumers are becoming more conscious of ESG issues, which is influencing their purchasing decisions as noted recently by the Head of Marketing at a Thai consumer goods company, "Consumers increasingly want to purchase products from organizations that are good at achieving their ESG goals."[1]

In this new era where sustainability has become the new norm and a business imperative, companies in all sectors are striving to achieve ESG targets and goals, which are above and beyond fundamental regulatory standards. For example, reaching zero carbon emissions targets, eliminating forced labor from the entire supply chain, and improving animal welfare.

Despite the good intentions, companies engaging in ESG activities are not exempted from the obligations to comply with laws and regulations. Here, we highlight key competition law issues that may arise.

Anti-Competitive Agreements

Often, businesses do not work alone to achieve their desired ESG goals. Sometimes this is because collaborating with other businesses can be more practical and efficient — sharing their expertise, tasks and costs — and sometimes because businesses will only be able to successfully implement meaningful ESG initiatives by collaborating with the entire industry or supply chain. Consequently, many initiatives have been implemented by collaborations among companies within the supply chains and also among competitors. For example, one of the ESG collaborative engagements in Thailand has been established from a joint effort of around 32 Thai institutional investors including fund management companies and insurance companies.

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[1] Page 12, From Strategy to Action — Advancing ESG in Asia Pacific, Baker McKenzie.

ESG collaborations may, depending on the circumstances, require involvement from the concerned parties in one way or another, such as through a management meeting, a meeting among the working team members, a meeting in a trade association or some other form of communication (whether verbally or in writing). Once we have entered into this area of collaboration and cooperation among business operators and getting together to discuss business and concerns related to their industry, an inference could be drawn by the competition authority of potential anti-competitive agreements by the business operators.

Of course, not all collaborations and actions are prohibited. The Trade Competition Act B.E. 2560 (2017) prohibits anti-competitive joint conduct between business operators that may create a monopoly, or will reduce or limit competition regarding any goods or services, with limited exceptions. Generally, the examples of joint conduct that are absolutely prohibited includes agreements on price, territory, customer allocation, etc. Agreements on other matters, such as setting trade terms and conditions to be the same, may be exempted if it has an objective to enhance production, distribution or supports economic or technical development. The term "agreement" is broadly defined to include a wide range of activities, from a formal agreement to a mere information exchange. Failure to comply with the law may result in criminal and administrative fines.

Vertical Restraint

ESG initiatives may also involve other operators in the supply chains (e.g. suppliers or customers). For instance, a question may arise if a company can request its suppliers to commit to its ESG policy (such as the requirement to use sustainable materials or to refrain from using unlawful forced workers). The vertical restraints to be imposed should be assessed on a case-by-case basis, even though Thai competition law recognizes the concept of the rule of reason.

Therefore, companies should carefully design and plan their ESG programs before putting them into action. Compliance guidelines and pre-emptive measures can also be put in place to minimize the potential risks and exposures under the competition law.

Should you have any questions, please contact our Competition team at Baker McKenzie.

We Can Help

The Bangkok Competition Group comprises seasoned lawyers with a deep knowledge and understanding of the local regulatory climate. We actively engage with regulators to help shape the regulatory and enforcement environment. The diversity of experience in our team affords our clients the benefit of effective assistance, in particular when dealing with competition investigations and litigation before the authorities and courts. We can assist clients with a range of services, including: Antitrust counseling and compliance; Compliance policy development; Merger control; Cartels; Unfair trade practice; Competition law health-check and audits; Legal and compliance training; and Anti-monopoly/Competition litigation, among others.

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